

Friday, 31 May, 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

A Motion by Prosecution for separate
opening statements, and that the Tribunal
take judicial notice and admit certain
documents without further authentication.

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Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:
Elvira Whalen.

Appearances:

For the Prosecution Section:

A. J. MANSFIELD, Justice, Associate Counsel,
acting on behalf of the Commonwealth of
Australia.

For the Defense Section:

BEVERLY M. COLEMAN, Captain USNR, Chief of
Counsel;

ALFRED W. BROOKS, Captain, Counsel for the
Accused OKAWA, Shumei, and KOISO, Kuniaki;

MR. JOHN W. GUIDER, Counsel.

For the Office of the General Secretary, IMTFE:

VERN WALBRIDGE, Colonel, CAC,
General Secretary;

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat; and

MR. G. WALTER BOWMAN,
Clerk of the Court.

The proceedings were begun at 1000.

THE PRESIDENT: This morning we are dealing with a motion dated the 23rd of May asking for certain directions including one relation to the presentation of the case in separate phases, and for liberty to substitute documents from the Japanese Government offices without further authentication, and to take judicial notice of certain events and documents. I understood the parties, or the defense and prosecution, might be able to come to some arrangement as to many of these matters.

MR. JUSTICE MANSFIELD: Yes. We had a conference with the defense yesterday, and with regard to Items 1, 2 and 5 -- it was more or less matters of procedure on the motion --

THE PRESIDENT: Yes.

MR. JUSTICE MANSFIELD: We came to a reciprocal agreement with regard to that. The defense apparently raises no objection to the opening of the evidence prior to the commencement of each separate phase, and we have no objection to an opening statement if they call the accused to give evidence -- that, of course, can happen, the case for the accused -- for each accused -- prior to his giving evidence.

With regard to the production of documents from the Japanese Government offices, the defense raised no

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With regard to the production of documents from the Japanese Government offices, the defense raised no

objection to that. Documents purporting to come from a Japanese office could be produced without further proof of authenticity, subject to the right, of course, of the defense to object to their relevancy, materiality, or to correct them if they should subsequently find that any document was not the final document relating to a particular subject. For example, we may probably produce a first draft which may not be the final draft, and the defense would be at liberty to correct it if it was wrong.

Then with regard to the numbering of exhibits, the defense agreed that it could be done in this way; it would probably be the most convenient for the Court to have all exhibits in chronological order in accordance with the time when they are produced, and not have a separate list of defense and a separate list of prosecution documents.

THE PRESIDENT: Just as in an ordinary case.

MR. JUSTICE MANSFIELD: Yes -- well, I understand by "ordinary case" you are talking about an ordinary case in Australia. In other places I understand they have separate lists for the defense and the prosecution.

With respect to the other two matters, Mr. Allen, who was at the conference yesterday, is drawing up what he calls a stipulation, which I understand is an agreement in relation to those documents. And that list of documents,

it was the basis of the agreement, as I understood, that if the Court would then take judicial notice of the change, then the defense would not object to their being produced.

THE PRESIDENT: Without proof.

MR. JUSTICE MANSFIELD: Without proof of authenticity, subject to their right to correct them if the testimony proved they were wrong, also subject to their right to object at the proper time to their materiality and to their relevancy. You see these are to be produced really before the evidence commences. The idea is that these are documents that are going to be used by the prosecution, and if the defense has them at this particular stage, they can study them if they desire to, and if they are incorrect they can be corrected. There is no question about correcting them if they are incorrect.

THE PRESIDENT: At what stage will they take them as proved if that is the attitude of the defense?

MR. JUSTICE MANSFIELD: When they are referred to in evidence, they will be referred to -- as they go through the evidence of certain phases, then the particular document will be referred to by its exhibit number, and then if there is any -- I presume if there is any objection to the text, namely, that it is not correct, we will probably be notified about that at that time, or before. Then when the document is referred to, the defense

has the right to object to it being used because it is irrelevant. I suppose that would be their position. They do not forego any of their rights to object to it on the ground of materiality, or relevancy. Really, it is not a case of taking judicial notice, it is a case of their producing them in evidence without formal proof of authenticity.

For example, some of these treaties which are set out there we have, as a matter of fact, with regard to some of them, certificates from the United States Secretary of State, some of them we have not got as yet. That might be a matter of holding the proceedings up if we can not get the proof of authenticity.

MR. GUIDER: We will have no trouble on authenticity; we will not challenge the authenticity of any document unless we have affirmative information it is not what it purports to be. As I understand it, this is really a matter of convenience.

MR. JUSTICE MANSFIELD: That is right.

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MR. JUSTICE MANSFIELD: That is the idea.

CAPTAIN BROOKS: What you are merely doing is marking these for identification subject to calling them up at a later time, then your objection will be raised when you come to them.

MR. GUIDER: That is what it amounts to, yes. That is exactly what it is, identification.

THE PRESIDENT: When we admit a document for identification, we mark it with a letter. At some stage of the Court it is tendered and becomes an exhibit. I am just concerned to know when these documents can be marked as exhibits in the true sense.

MR. GILLER: That is exactly our practice, your Honor, but when we give it a number for identification, we reserve that number for it in evidence, so that it can either be a letter or a number. We could have it Exhibit No. 1 for identification until the time came for it to be tendered in evidence, then "for identification" will be dropped off and it would become Exhibit No. 1 in the case. In that way you save your numbering, and at the same time if, let us say, Exhibit 11 for identification cannot be properly tendered later because it is not material, that is shown it is not material, then it just becomes a blank exhibit number, and there would be no Exhibit 11 in evidence.

THE PRESIDENT: Well, when the document is first produced in court, will the party producing it say "I tender this document which will be Number 1 for identification?"

MR. JUSTICE MANSFIELD: Yes, there will be no objection to that.

THE PRESIDENT: In the course of the evidence of the witness during whose evidence it is produced, will it then be tendered finally?

MR. JUSTICE MANSFIELD: We can do that, yes.

MR. GUIDER: That is the way we do it, your Honor.

THE PRESIDENT: It may be such document could not be tendered formally at that stage, but at some stage of the Court all these documents will be formally tendered, we cannot say now at what stage, in any case --

MR. BOWMAN: Sir William, may I ask if they are going to present the documents to the clerk for numbering as exhibits, then we just number those exhibits in the proper sequence, and then the only difference as to whether they have been admitted or not will be shown by the record -- as to whether they have been admitted.

MR. JUSTICE MANSFIELD: Documents produced -- for example Exhibit 1 -- assume that is the number -- Exhibit 1 for identification, the words "for identification" will be added. Then when the document is referred to later --

when it is formally produced -- the words "for identification" will be dropped.

MR. GUIDER: When you number it the first time you will say Exhibit 1 for identification, when it is tendered in evidence, or some of it is tendered in evidence and it is then accepted by the Court in evidence, you simply strike off the words "for identification." It will keep your number in either case.

THE PRESIDENT: You are very clear about that.

MR. JUSTICE MANSFIELD: With respect to incidents that were set out in the schedule, naturally there are some of them in controversy. We have tried to describe them without any controversial documents in them, but for example the first one, the Mukden Incident, the idea was really to establish that there was a Mukden Incident on that date. It was the date rather than the chronological list of incidents, and those are all incidents which we are relying upon in our case, and the way it is it probably may assist the defense to know those, but actually all the data will have to be proved later, so it will not really make much difference whether their authenticity has been established at the time they are presented or not. It will be a very simple matter for you to establish the fact in evidence by some appropriate witness.

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about that, and we will not argue the Mukden Incident was August 12th, 1931, or whatever it was, those are things which can be established, and those things we will ask the Court to take notice of by having the record show the correction. There are some of those dates I am quite sure are in error, and I think it would be wrong not to take notice of an error.

MR. JUSTICE MANSFIELD: That is not really important, I don't think.

THE PRESIDENT: Have you been through the whole ninety-five events, Mr. Guider?

MR. GUIDER: I have, yes, sir. I have read them, I have talked over some of them with my Japanese associate, and he has pointed out certain corrections that should be made, some of which seem to be minor, such as 9th September, when it should have been the 1st of September.

THE PRESIDENT: You don't question these things happened in every case?

MR. GUIDER: Yes, there are some questions of fact, too. For instances, the invasion of Siam as viewed by my associate counsel is quite a different transaction and has quite a different meaning from being asked for transit. The thing is listed as a fact, later it should be challenged.

MR. JUSTICE MANSFIELD: Anyhow those matters will all have to be dealt with and accepted or not.

THE PRESIDENT: I was going to suggest that Monday be the day for motions. We have quite a few to dispose of. It may be that in some cases leave will have to be obtained to move them because they were filed after the 25th of May.

MR. JUSTICE MANSFIELD: They were all filed on the 25th, Saturday, weren't they?

THE PRESIDENT: That makes them perfectly proper to deal with without regard to that limitation.

MR. JUSTICE MANSFIELD: What I would suggest, I wish to convey to the Court, is that Monday do you think we will get through the motions, some of them are formal?

MR. GUIDER: I should think so unless our language difficulty slows us down, and it does not seem to me there is a great deal of argument about that.

MR. JUSTICE MANSFIELD: What I would suggest, I wish to convey to the Court, the Tribunal, is that Monday be set aside for motions, and then the opening of the case proper commence on Tuesday.

THE PRESIDENT: Yes.

MR. GUIDER: Of course, that is assuming the Court has acted on the motions by Tuesday morning.

MR. JUSTICE MANSFIELD: Yes. It might be another month before the case starts if you get a continuance.

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the day after.

MR. JUSTICE MANSFIELD: As a matter of fact, that was discussed, and the chief of counsel is very anxious that the case should proceed immediately after his opening rather than there should be any delay.

THE PRESIDENT: That is a matter to be determined.

MR. JUSTICE MANSFIELD: His opening will be ready very shortly.

There was one other matter that was mentioned at the conference yesterday, and that was Mr. Allen mentioned that the defense did not want to interrupt during the reading of the speech, Mr. Keenan's speech, and that, therefore, if we could give the defense a copy, say, some days before, they could then go through it and notify us, say on Monday, of the things they objected to and we could either cut them out, or whatever the objection was. But we anticipate that we will have the final speech ready by tomorrow. Mr. Williams, who is in charge of that particular part of the case, intimated that by tomorrow at mid-day there will be copies ready for the defense.

MR. GUIDER: That leaves us very short, Saturday noon being the end of our working week. Of course, that makes no difference; we can work Saturday afternoon and Sunday. But with our motions coming up on Monday, and the trial, the opening statement, perhaps scheduled for

Tuesday leaves us very little time to give the proper amount of attention to the opening statement. I am wondering whether we could not perhaps do a better job if we proceed right now on the assumption there is going to be no continuance. If that should be the decision of the Court, the Court would probably want to take those motions under advisement after the Monday session, could announce then Tuesday morning, have it definitely understood if we are going ahead, his opening statement would be on Wednesday. That would give us one more little bit of a chance to get our objections filed in writing before the motion is made. If that is to be on Saturday -- to file that Tuesday morning -- with Monday set aside for the motions, and being Saturday, no other regular work week after that -- of course, our lawyers will be willing to work, but it may be hard to get our one or two stenographers to work over the weekend. It leaves us pretty short to hand it to us on Saturday and be expected to file our objections on Tuesday morning, with all day Monday being spent on motions. I would, rather than ask for a postponement of Mr. Keenan's speech, that it might be the better way if we go ahead with the opening statement the first thing Wednesday morning. The Court could announce its decision on the motions on Tuesday. Then, if we go ahead without delay, we will take up the opening statement

the first thing Wednesday morning. I am very much afraid we would not have time to get our objections, if any, in proper form before that.

MR. JUSTICE MANSFIELD: As a matter of fact I do not believe there would be any objection from the prosecution because we are having terrific translation difficulties. It might be the motions would run over into Tuesday anyhow, so there would be no real delay.

MR. GUIDER: We still would not ask for any longer time than Wednesday morning. We will try very hard to be ready to go ahead at that time. Of course, we are going to have to have it translated for our Japanese counsel --

MR. JUSTICE MANSFIELD: It is already translated subject to some amendments to be finally settled this afternoon at half-past one.

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MR. JUSTICE MANSFIELD: As far as the prosecution is concerned we will not ask for any adjournment, we put ourselves in the hands of the Court.

THE PRESIDENT: Yes, I understand. Well, suppose we would meet on Monday and grant a continuance for a week or so, how would that affect Mr. Keenan? Would he still not want to hold up his address?

MR. JUSTICE MANSFIELD: Yes. His desire is to deliver his address at the commencement of the --

THE PRESIDENT: To go straight on with the evidence after he opens?

MR. JUSTICE MANSFIELD: After he addresses, yes.

THE PRESIDENT: Well, these are matters of arrangement. I do not suppose I am expected to make any order on what I have heard today?

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about our maneuvers and our operations. For instance, they will confuse the filing of a motion for a continuance with the action of the Court granting it. It is just as well to have them in court where they know what is going on.

THE PRESIDENT: I will make an order by consent in the terms that you have stated to me this morning, and I reserve consideration --

MR. JUSTICE MANSFIELD: I will ask your Honor not to make that order just at the moment because Mr. Allen is drawing up the actual matters that he is prepared to agree to. I think they will be in substance in accordance with what I have said, but he was to have that to me this morning -- I don't know if any of you gentlemen were present yesterday --

CAPTAIN COLEMAN: No.

MR. JUSTICE MANSFIELD: I would ask that your Honor would not make that order until Mr. Allen has --

THE PRESIDENT: Not today.

MR. JUSTICE MANSFIELD: You could make it formally on Monday.

THE PRESIDENT: Yes, I could make it Monday morning.

MR. JUSTICE MANSFIELD: Yes.

THE PRESIDENT: Would you want me to reserve the

balance of the order for consideration later, is that the idea, or adjourn?

MR. JUSTICE MANSFIELD: Adjourn the whole matter until Monday, then those agreements can be definitely made.

THE PRESIDENT: Yes. Very well, that will be done. Is that all our business this morning?

COLONEL WALBRIDGE: What time does Court open Monday morning?

THE PRESIDENT: Half-past nine. Is that suitable to all counsel? We sit from nine-thirty until twelve, and from one-thirty to four-thirty -- one-thirty to four.

MR. GUIDER: I hope there will be an earlier adjournment hour in the afternoon because of something that perhaps has not occurred to some of the gentlemen. We are going to have trouble seeing our Japanese defendants. They will be away from us during the day. It will not be like where your client is right at your elbow, where you can turn and consult with him. Also, the problem of getting out to Sugamo Prison at night, where we sit day after day in court, is going to be very tedious and tiresome. I wanted to bring that to the attention of the Court informally, and I would like to ask if at the end of the day the defendants may be kept here for a half-hour, or an hour, and made available to us before they are taken back.

That may mean a slightly earlier adjournment hour, even if we have to start earlier in the morning. We are not asking for an awful lot, but maybe something in the nature of a half-hour, or an hour, so that we may be with them for some little bit every day without going to the trouble of getting passes for Sugamo Prison and making the trip out there. The transportation problem out there is also a problem. Also, for our men who are working all day long it is rather hard.

THE PRESIDENT: All right. Nine-thirty to twelve, one-thirty to four.

(Whereupon conference was adjourned
at 1030.)

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